

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION III

CA06-517

MARCH 7, 2007

JERRY EVANS

APPELLANT

v.

LUTHER EVANS

APPELLEE

APPEAL FROM THE LOGAN COUNTY
CIRCUIT COURT
[CV-01-66-1]

HONORABLE PAUL EDWARD
DANIELSON, JUDGE

AFFIRMED

This case involves a dispute over payment of a promissory note executed by appellee, Luther Evans, and his two nephews, one of whom is the appellant in this case, Jerry Evans. The trial court found in favor of Luther Evans and awarded him \$108,217.44. Jerry Evans's sole argument on appeal is that the trial court erred in not dismissing the claim due to untimely service of process. We affirm.

For a period of years, the parties engaged in various business dealings under Northwest Amusement, Inc. (hereinafter "the Corporation"), which was formed in 1995. Testimony showed that the Corporation was struggling, and on or before December 31, 1998, the Corporation's corporate status was revoked. In an effort to merge previous loans made from Luther Evans to the Corporation, Jerry Evans, and Joe Evans, a promissory note was executed on February 25, 1999. The principal amount of the note was \$74,000, with interest from that date until maturity at the rate of ten percent per annum. At the time of trial, eight payments had been made on the note, and the balance on the

note was \$65,783.

On October 30, 2001, a complaint was filed in this matter, and service was made on two of the defendants, the Corporation and Raymond Evans (Jerry Evans's brother). Both the Corporation and Raymond Evans defaulted. A hearing was held on February 15, 2002, and a judgment was entered against both the Corporation and Raymond Evans. On that same day, counsel for Luther Evans filed a motion for enlargement of time to serve Jerry Evans. The motion alleged that Luther Evans was having difficulty obtaining service on Jerry Evans. The motion was granted on February 15, 2002, extending the time for service of process 120 days (from February 27, 2002 to June 27, 2002). Subsequently, on August 1, 2002, an order for enlargement of time was entered, granting an additional 120 days (from June 27, 2002 until October 25, 2002) for service on Jerry Evans. Another motion for enlargement of time was filed (via fax) on October 24, 2002, requesting an additional thirty days from October 25, 2002. An order for enlargement of time was entered (via fax) on October 24, 2002, adding an additional thirty days (from October 25, 2002 until November 25, 2002). The order was filed of record on October 31, 2002. There is no dispute that appellant was served on November 7, 2002.

On that date, appellant filed an answer to Luther Evans's complaint, asserting as an affirmative defense that the complaint should be dismissed for untimely service of process under Arkansas Rules of Civil Procedure Rule 4(i). The trial was held on November 7, 2005, and the trial court denied appellant's motion to dismiss. At the conclusion of the trial, judgment was entered against appellant in the amount of \$108,217.44.

Appellant does not challenge the merits of the outcome of the trial. Rather, appellant alleges that the trial court erred in not granting his motion to dismiss because he was not timely served. Specifically, appellant argues that Luther Evans did not file a motion to enlarge the time for service

of process upon which the August 1, 2002 order for enlargement of time could have been entered.

Arkansas Rule of Civil Procedure 4(i) (2002) provides:

If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause. If service is made by mail pursuant to this rule, service shall be deemed to have been made for the purpose of this provision as of the date on which the process was accepted or refused. This paragraph shall not apply to service in a foreign country pursuant to Rule 4(e) or to complaints filed against unknown tortfeasors.

The August 1, 2002 order for enlargement of time makes reference to a motion being before the court. The Order specifically states, “Now on this 24th day of June, 2002 comes before the Court the Plaintiff[s] Motion for Enlargement of Time.” The court order granting the extension need not be filed within the 120 days, so long as the motion is brought before the court within that time frame. *See Honeycutt v. Fanning*, 349 Ark. 324, 78 S.W.3d 96 (2002) (citing *Edwards v. Szabo Food Service, Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994) (finding that when motion to extend time for service of summons is filed prior to expiration of 120-day period provided by rule, the trial court has authority and jurisdiction to grant a motion, even when order to extend time for service is entered after expiration of that period)).¹ Even though the record contains no written motion filed on June 24, 2002, the August 1, 2002 Order unequivocally references that a motion was made on June 24, 2002. Arkansas Rule of Civil Procedure 4(i) requires that a motion must be made within the 120 days, but the rule does not specifically require that the motion must be filed within that time frame. *See Raymond v. Raymond*, 343 Ark. 480, 484, 36 S.W.3d 733, 735 (2001) (holding it is mandatory under

¹Although the court in *Edwards* and *Honeycutt* refer to a motion being *filed* within 120 days of the filing of the suit, the issue in those cases was not whether a motion had been *filed* or otherwise *made*.

Arkansas law that service of process must be made within 120 days after the filing of the complaint unless there is a motion to extend, and if service is not obtained within the 120-day period and no such motion *is made*, dismissal is required upon motion or upon the court's own initiative) (emphasis added). Because the motion was made within the 120-day time frame provided in Rule 4(i) we hold that there was compliance with Ark. R. Civ. P. 4(i). Accordingly, we affirm.

GLOVER and MARSHALL, JJ., agree.